IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

No: S 314 of 2013

BETWEEN:

SEONG WON LEE
Appellant

AND

THE QUEEN
Respondent

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APPELLANT'S SUBMISSIONS

PART I: SUITABILITY FOR PUBLICATION

1. This submission is in a form suitable for publication on the Internet.

PART II: CONCISE STATEMENT OF ISSUES

2. When a person has been compulsorily examined by an investigative agency such as the New South Wales Crime Commission ('*NSWCC*'), and the transcript of their examination is later illegally or improperly disseminated to the prosecuting authorities (for the purpose of informing as to lines of defence in a trial), including to the prosecutor with carriage of the
20 person's criminal trial and is read by him/her, what more is necessary, if anything, to establish that a miscarriage of justice has occurred for the purposes of s6(1) *Criminal Appeal Act* 1912 ('*Criminal Appeal Act*')?

3. Where there is a complaint about failure of the accusatorial process such as to constitute a miscarriage of justice is such a miscarriage '*only made out where the appellant is able to establish a causal connection between the irregularity and the conviction...*' (CCA [30]) and/or on establishment of '*practical unfairness*' (CCA [147], [149], [161]-[164])?

Dated: 7/02/2014

Filed on behalf of the First and Second Appellants
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PART III: NOTICES UNDER S78B OF THE *JUDICIARY ACT* 1903 (CTH)

4. We certify that we have considered whether notice should be given in compliance with s78B of the *Judiciary Act 1903* (Cth) and s78B notices have not been issued.

PART IV: CITATION OF THE REASONS FOR JUDGMENT

5. The citation of the reasons for judgment of the Court of Appeal (NSW) is *Lee, Do Young v R; Lee, Seong Won v R* [2013] NSWCCA 68.

PART V: NARRATIVE STATEMENT OF FACTS

6. On 24 August 2009, the Management Committee of the NSWCC referred to the Commission for investigation the '*Swansea reference*' (Annexure 'C' Affidavit Timothy O'Connor dated 21 August 2012), a condition of which was that the Committee be satisfied that '*ordinary methods of police investigation are unlikely to be effective*' (see section 25(2) *New South Wales Crime Commission Act* ('*NSWCC Act*'), CCA 12/11/12 tp14.30-.36). [redacted]

7. On 7 December 2009 police executed a search warrant at 1501/6 Lachlan Street Waterloo, NSW ('*the Waterloo premises*'). In the course of the search, they found in the laundry area a weapon (with ammunition and accessories) and a quantity of white powder (in boxes labelled 'washing powder') later found to be pseudoephedrine. During the course of the search the appellant Seong Won Lee ('*the second appellant*'), who was then living in the apartment, returned to the premises, was arrested and later charged with possession of the weapon, ammunition and accessories pursuant to s7(1) of the *Firearms Act* 1996 (NSW) and s7(1) of

the *Weapons Prohibition Act* 1998 (NSW). Police also discovered in the locked, main bedroom of the premises another weapon, a quantity of white powder (in large bags), later found to contain pseudoephedrine, and papers belonging to various people including Do Young Lee ('*the first appellant*'), who is the second appellant's father, and $1.147 million cash. In all, police took possession of approximately 45kg of white powder. At the time of seizing the material the Commission conceded it had '*a pretty strong suspicion...that it was likely to be drugs*' (CCA 12/11/12 tp21.3-.6). Initial tests for prohibited substances proved negative.

8. On 10 December 2009 the NSWCC issued a summons under section 16 of the NSWCC Act to the second appellant to appear to give evidence on 16 December 2009 [redacted]

9. On 14 December 2009 the first appellant was charged in relation to the money alleged to be proceeds of crime, possession of the weapon found in the locked, main bedroom and possession of the weapon, ammunition and accessories found in the laundry. Both appellants were remanded in custody. The first appellant had previously been charged with drug and money laundering offences and examined by the NSWCC.

10. On 16 December 2009 the second appellant was compulsorily examined by the Commission under the NSWCC Act. [redacted]

[redacted]

11. On 4 May 2010, Ms Parker, an officer of the NSWCC, emailed the then Assistant Director, Mr O'Connor requesting approval for the hearing transcripts of the appellants '*so that police can review them for the Swansea brief.*' Mr O'Connor forwarded this email to Mr Bradley '*for your approval*' to which Mr Bradley replied '*Approved*' (Annexure 'G' Affidavit Timothy O'Connor 21 August 2012). As at 4 May 2010 charges against both appellants were imminent as further drug analysis on the white powder confiscated from the Waterloo premises had proved positive since about April 2010 (CCA 12/11/12 tp20.35.-49).

12. On 13 May 2010 the first appellant was charged with two counts of supply of prohibited drugs, contrary to section 25(2) of the *Drug Misuse and Trafficking Act* 1985 (NSW) ('*DMT Act*'), one count relating to the powder found in the laundry, the other relating to the powder found in the main bedroom.

13. On 17 May 2010 the second appellant was charged with supply of prohibited drugs contrary to section 25(2) of the DMT Act, limited to the powder found in the laundry.

14. On 1 July 2010 a solicitor with the DPP, Ms Garrity, emailed the officer in charge of the criminal investigation, Detective Plummer, requesting the transcripts of the NSWCC compulsory hearings concerning the appellants stating, '*I understand that Seong and his mother both gave evidence at the CC? What about Jason/Do Young? If it is possible – I would like to see those transcripts – especially if it is something that the defence are going to try to rely on – specifically that they had no knowledge that the washing powder was actually drugs*' (Annexure 'K' Affidavit Timothy O'Connor 21 August 2012). This communication was first disclosed to the second appellant on 21 August 2012 (paragraph 54 Affidavit Dennis Miralis 17 October 2012).

15. On 2 July 2010 Ms Parker, prompted by Detective Plummer, sent an email to Mr O'Connor stating, '*Brendan Plummer has emailed me to advise the DPP dealing with the LEE matter have asked for copies of the hearing transcripts. They want to view them on the basis they need to know whether there is content in them which the defence may rely on – i.e. knowledge of Seong Lee and Jin Ei Jun about the washing powder imports.*' On the same date Mr O'Connor forwarded the email to Mr Bradley to '*approve the dissemination to the DPP*'. Not long after, Mr Bradley replied, '*Approved*' (Annexure 'J' Affidavit Timothy O'Connor 21 August 2012). This chain of emails was not disclosed to the second appellant until 9 August 2012 (paragraph 53 Affidavit Dennis Miralis 17 October 2012). Shortly after 2 July 2010 the transcripts of the appellants' compulsory examinations were disseminated to the DPP. The evidence of Mr O'Connor was that at the time of forwarding the email to Mr Bradley, he was unaware of the email from Ms Garrity to Detective Plummer the previous day (CCA 12/11/12 tp28.11-.20).

16. On 28 October 2010 police served Part II of the brief on the appellants and the prosecution, including the appellants' compulsory examinations (paragraph 6 Affidavit Brendan Plummer 18 September 2012).

17. At a pre-trial application on 23 November 2010, the first Crown prosecutor Mr Watts, in the course of oral argument, revealed that the Crown had possession of the transcripts of the appellants' compulsory interview stating that '*whilst that evidence isn't admissible in these proceedings I suppose it gives us a bit of an idea where they might be heading.....there's things said there to the Commission, which, as I say, give the Crown at a least a possible scenario for where the defence might suggest that there's some innocent explanation about, not only the money in the unit, but they don't know anything about drugs*' (23/11/10 tp2.28-3.20).

18. On 17 January 2011 the joint trial of the appellants commenced before Solomon DCJ and jury. The second Crown prosecutor Mr Barr was briefed to appear. In December 2010 Mr Barr had been provided with the Crown brief that included transcripts from the NSWCC (paragraph 2 Affidavit Michael Barr 18 September 2012). The effect of Mr Barr's evidence

was that he had read the examination transcripts of both appellants although he did not have a specific recollection of reading the second appellant's transcript (paragraph 3 Affidavit Michael Barr 18 September 2012). In cross examination on the subject of the transcripts Mr Barr agreed that it was '*always helpful to know what the defence will say about a particular issue in the Crown case*', said '*it was interesting to have that material*' and agreed that he found it '*informative*' (CCA 12/11/12 tp55.14-19). Mr Barr also said that he considered it '*unusual*' to have material which '*seemed to disclose*' the defence case but that having received the information in his brief he did not go further to see whether it should have been sent to him (CCA 12/11/12 tp55.49-tp56.2). During the course of the cross-examination of Mr Barr, Basten JA appeared to doubt the relevance of this issue, altogether (CCA 12/11/12 tp48.22-23, tp54.42-46).

19. The indictment contained eight charges. In short form they were as follows: (1) possess prohibited firearm, namely a sub-machine gun found in the laundry (both appellants), (2) possess a prohibited weapon, namely a silencer found in the laundry (both appellants), (3) possess a prohibited weapon, namely two firearm magazines found in the laundry (both appellants), (4) possess a prohibited weapon, namely a brass catcher found in the laundry (both appellants), (5) possess a pistol, namely a six chamber revolver found in the locked main bedroom (first appellant), (6) supply a prohibited drug, namely pseudoephedrine, in an amount not less than a large commercial quantity relating to the powder found in the laundry (31.446 kg) (both appellants), (7) an alternative to count 6, knowingly take part in the supply of the large commercial quantity of pseudoephedrine found in the laundry (second appellant), (8) supply not less than the large commercial quantity of pseudoephedrine relating to the powder found in the locked, main bedroom (first appellant). As noted above, the second appellant was charged with respect to the items found in the laundry and not the items found in the locked main bedroom.

20. The second appellant did not give evidence. As to counts (6) and (7) the Crown relied on the evidence of Mr Pak, who was a person knowingly concerned with the importation of the pseudoephedrine, that the second appellant assisted him from time to time to unload imported boxes and that the second appellant selected marked boxes of cough medicine,

which the Crown submitted contained prohibited drugs (tp1043.36-tp1044.39). The Crown submitted in closing that Mr Pak's evidence was important in establishing the requisite knowledge on behalf of the second appellant (tp1043.36.-37). In closing, counsel for the defence, whilst submitting that it was not in dispute that the second appellant from time to time received boxes from Mr Pak (tp1096.16.-17), submitted that the jury would entertain a doubt as to the second appellant's knowledge that the powder in the laundry was a prohibited substance (tp1080.9.-17, tp1086.1.-4, tp1091.22.-24, tp1092.38.-39). As to counts (1)-(4), the main issue was whether the jury could exclude the reasonable possibility that the weapons, ammunition and accessories belonged to someone other than the second appellant.

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21. On 16 March 2011 the jury returned verdicts in the joint trial. The second appellant was found guilty of counts (1)-(4) relating to the firearms in the laundry, was acquitted of count (6) of supplying the drugs found in the laundry and found guilty of count (7) of knowingly taking part in the supply of the drugs located in the laundry.

22. On 6 December 2011 following his trial, the second appellant was sentenced by Solomon DCJ to an overall sentence of eight and a half years with a non-parole period of five and a half years to date from 30 April 2010. A head sentence of seven and a half years was referrable to count 7.

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23. The appellants appealed against their criminal convictions. The appeal was heard over three days: 23 August 2012, 12 November 2012 and 13 November 2012. The grounds raised by the second appellant included:

    (1) The trial miscarried due to the prosecutor's possession of the appellant's compulsory interview which denied the appellant's right to a fair trial
    (2) There was a miscarriage of justice in the appellant's trial occasioned by the use of the evidence compelled from the appellant on or about 16 December 2009 in the brief of evidence and the trial of the appellant

30 24. In the first set of written submissions filed on behalf of the DPP on 21 August 2012 ('*RS 21 August 2012*'), it was conceded that '*In view of the protective purpose of s.13(9) of the NSWCC Act in relation to a fair trial, the Crown concedes that the dissemination to the DPP was unlawful, in the unusual circumstances of this case, and that the appellants' trial*

miscarried in respect of the drugs charges...The Crown does not make this concession in respect of the appellants' trial on the weapons charges' (paragraph 7 RS 21 August 2012). Nevertheless it was submitted that it would not be appropriate to enter a verdict of acquittal or order a permanent stay on these counts, as contrasted with an order for retrial (paragraph 8 RS 21 August 2012). On the first day of the appeal the Court expressed reservation about accepting the DPP's concession (CCA 23/8/12 tp7.34-tp12.8). Following the first day of the appeal and before the second day, the Crown advocate withdrew the second limb of the DPP's concession that there had been a miscarriage of justice in respect of the drug convictions, but maintained the concession that the dissemination to the DPP was unlawful (paragraphs 1,2 Respondent's supplementary submissions on ground one 12 November 2012)

25. On 3 April 2013 the Court of Criminal Appeal dismissed both appellants' appeals against convictions. The grounds which are the subject of this appeal were dealt with by Basten JA, with Hall and Beech-Jones JJ agreeing.

26. In the case of both appellants Basten JA accepted that as at the trial no person in the '*appellants' camp*' knew that the transcripts had been unlawfully disseminated by the NSWCC (at [140]). As noted above, it was only by 21 August 2012 that the appellants became aware of the fact of the email exchanges between the DPP, police and NSWCC on 1 and 2 July 2010.

27. In the case of the first appellant Basten JA held (at [121]) that the examinations occurred before he was charged with the material offences and, accordingly, they did not offend the principles in *Hammond v The Commonwealth* (1984) 152 CLR 188 ("Hammond"). The same apparently applied to the second appellant (see at [156]).

28. Basten JA concluded that possession of the material by the prosecution was appropriate [162], even though (at [54]) his Honour had held that the Director's concession obviated '*the need to consider the true scope and operation of s.13(9)*'.

29. His Honour also made the observation (at [19]) that '*neither appellant sought to establish any demonstrable element of unfairness and, indeed, they submitted that to adopt such a course would be both unnecessary and inappropriate*'. In the case of the second appellant submissions were made directed to the possession and knowledge of the material by the prosecution and the proposition that the defence were obliged to conduct the case upon the basis that the prosecution possessed and knew the contents of the examination record concerning as it did the subject matter of the prosecution. The appellant relied on the affidavit of Mr Phillip Stewart, in particular Mr Stewart's opinion that '*the release of his examination removed the possibility of calling Seong Lee to give evidence at Trial*' (paragraph 19 Affidavit Phillip Stewart 15 October 2012). Oral submissions on the topic were also made (see CCA 12/11/12 tp53.17-27, tp76.3, tp84.24-tp85.31, tp87.10-28 and tp89.17-23). In addition, the second appellant relied on the matters referred to by Basten JA at [159] et seq.

PART VI: APPELLANT'S ARGUMENT

30. The following can be drawn from the narrative statement of facts:

a) At the time of the questioning of the second appellant on 16 December 2009 he had been charged with the firearms offences (on 7 December 2009). The questioning of the second appellant (on 16 December 2009) pursuant to Division 2 of the *NSWCC Act* covered [redacted] At the time of questioning, the NSWCC suspected that the confiscated powder contained prohibited substances.

b) Mr Bradley approved the release of the transcripts to the DPP on 2 July 2010 following upon a DPP request based on an expressed desire of the DPP to know what the defence case was. Mr Bradley did not address himself to s.13(9) of the

NSWCC Act and in so doing acted without regard to the protections afforded by that provision. Accordingly, there was no lawful basis for the DPP to be in possession of, and to know the contents of the transcripts.

c) The transcripts unambiguously concerned [redacted]

d) The nature of the DPP's request was to enable it to be forewarned of the defence case and (whether or not this made a '*practical*' difference to the trial) it was, in fact, so forewarned.

e) When the material was unlawfully or improperly released the appellants were denied the protection given by s.13(9) of the *NSWCC Act*.

f) Given that the DPP should not have been in possession of the interviews at all, officers of the DPP and the prosecutor should not have read them or have been aware of their contents.

g) The prosecutor at trial did read the transcripts, agreed that it was '*helpful*' to know what the defence would say, found them '*interesting*' and '*informative*'. That is he impermissibly knew what the appellants had said under compulsion and, in the case of the second appellant [redacted] If the second appellant gave evidence, then, of course, that would be evidence in the joint trial.

h) Mr Stewart, solicitor for the second appellant at trial thought that possession of the transcripts closed the gates on calling the second appellant; that is, it removed a possibility that remained open to that point. This appears to have been either overlooked by Basten JA (at [164]) and/or deemed '*arguably irrelevant*' (at [158]).

i) Although defence counsel and the solicitors had concerns about the possession of the compulsory examinations by the DPP and the prosecutor, the evidence does not suggest that they were aware of the illegality and impropriety in the release of the material until much later. This was accepted by the Court (see Basten JA at [140]).

31. The NSWCC Act has the same origin and is very similar, if not, in some relevant respects, identical to the *Australian Crime Commission Act* 2002 (Cth) ('*ACC Act*'), addressed in X7.

32. Although Basten JA accepted the Crown's concession (at [54], [123]) he does not appear to have accepted that s.13(9) gave an accused person the protection urged on the Court and accepted by this Court in, X7 (see X7 at [26], [51]-[57], [74], [81]-[83]; Basten JA at ([50]-[54]), [79], [125], [162]).

33. His Honour also distinguished *Hammond* and did so on several suggested bases (at [70) et seq.). One of those, and perhaps the main one, was that the questioning preceded the charge in this case. Although that difference exists in relation to the drugs offence, the making of the distinction tends to undermine the significance of the impropriety involved in the failure to observe the requirements of s.13(9). The significance of the breach is not to be measured here by reference to the fact of questioning but by reference to the fact of unauthorized release of such material. The '*fair trial*' the object of protection in s.13(9) is a trial in which accusatorial principles are observed and applied. That protection would effectively guard against both '*direct*' and '*derivative*' use by the prosecution. This proposition was endorsed by French CJ in *X7* at [55].

34. Possession of the material, reading, consideration of it and preparation for trial in the light of such insight is in itself '*use*' (*R v Seller; R v McCarthy* [2013] NSWCCA 42 at [104]); knowledge of that use by the defence and the foreclosing of the possibility of giving evidence is an identifiable effect of such possession and use.

35. Once such unauthorized possession and use of such material by the prosecution is established it is submitted that an irregularity has occurred consisting in a breach of a basic aspect of the accusatorial system which aspect s.13(9) is designed to protect (see X7 at [57], [83], [124]).

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36. When Basten JA addressed the question of '*unfairness*' his Honour identified three possible '*uses*' and considered them in turn (para [158] et seq.). His Honour did not address himself to (or must have discounted) the use that was actually made of the material by the prosecutor or the response of the solicitor, Mr Stewart.

37. When Basten JA came to a consideration of the consequences flowing from the dissemination of the material that consideration does not appear to have involved an acknowledgement of the illegality of the dissemination and possession of that material. Thus, when derivative use was considered (at [160]) this appears to have been based on
20 lawful dissemination. The further potential uses of the material were dealt with as if possession of the material was the equivalent of possession of an inadmissible record of interview (CCA at [161] et seq.), and it was said that there were '*good reasons which favour release to the prosecution of all potentially relevant material available to the police or other investigating authorities ...*' (CCA at [162]).

38. An order made under s.13(9) would properly restrain both direct and derivative use of the material, including the use which occurred here. Further, there is no real analogy with possession of inadmissible material relevant to a defence case (judgment at [162] and also [35]-[37]). Without more, there is not likely to be any impropriety in the possession by the

prosecutor of such material. Whether this were so in a postulated situation might depend on the nature of an identified impropriety and any consequences flowing from it.

39. As to the failure to object at trial (see CCA at [163]) the short answer is that the Court accepted that at the time of trial nobody in the '*defence camp*' knew of the facts which would establish the unlawfulness of the dissemination and this was accepted by the Court (see at [140]). In the absence of such knowledge it is difficult to see on what basis such an objection could then have been articulated particularly given that the objection would have to have been so that which flowed from the dissemination itself.

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40. As for the need to establish '*practical unfairness*' ([163], [164]) this also puts the matter too highly. Basten JA thought that the '*high point*' of the case was the '*obtaining*' of the material which should not have been provided ([164]). In fact, as was being advanced, the '*high point*' was the possession, reading and consideration of the material by the prosecutor and the '*closing of gates*' on the defence.

41. As with considerations that apply in cases such as asserted miscarriages arising from incompetence of counsel, there are good reasons for not inquiring too deeply into the reasons underlying decisions made at trial; cf *TKWJ v R* (2002) 212 CLR 124 at [27], [107], and this,
20 was acknowledged by Basten JA at [158]).

42. The suggested requirement of '*practical unfairness*', implies some actual deployment of the transcript, beyond derivative use (which his Honour thought permissible), and beyond that which was identified and relied on by the appellants, which his Honour either did not consider or can be taken to have been thought inadequate, or irrelevant.

43. As to whether or not Basten JA was considering '*miscarriage of justice*' in s.6 of the *Criminal Appeal Act*, or the proviso to that section is not entirely clear but it seems that the question to which His Honour addressed himself was '*the proviso*'. The question his Honour
30 thought '*necessary to ask*' at [63]) was '*whether there has been substantial miscarriage of*

justice as a result of these events' which is the language of the proviso. The conclusion he drew was that the applicants could not be said to have '*lost a possibility of acquittal*' (para 164), again the language of the proviso, particularly before this Court's decision in *Weiss v R* (2005) 224 CLR 300 ('*Weiss*'). So, too, framing the question in terms of '*practical unfairness*' also suggests that his Honour was addressing the proviso. If so, then the onus on that question lay not with the appellants but the respondent, which may be a matter of some significance in a case such as this.

44. Moreover, although '*losing a chance of acquittal*' may be an aspect of consideration of the proviso, since *Weiss* satisfaction of the '*negative proposition*' identified in that case is a necessary but not sufficient condition for applying the proviso; *Baida Poultry Pty Limited v R* (2012) 246 CLR 92 at [29].

45. Basten JA did not address himself at all to the negative proposition in *Weiss*.

46. It is the second appellant's case that the aspect of the accusatorial process which has been infringed, and which is the subject of the protection in s.13(9) and addressed in this Court's decision in X7, namely, is the right to trial by accusatorial process, including the non-compellability of an accused person.

47. Subject to qualifications not presently relevant, given the language of s.13(9) and its breach in this case, trial by accusatorial process in which an accused is not compellable, is submitted, is an essential '*presupposition of the trial*': *Weiss* at [46], making it inapposite to ask whether the appellants thereby *'lost a chance*' of an acquittal or to show '*causal connection between the irregularity and the conviction*' (CCA at [30]), or indeed to apply the proviso by answering the negative proposition in *Weiss*, namely, whether it was open to acquit.

48. Beyond these submissions the second appellant joins the submissions put by the first appellant at [29]-[31], [36], [37], [44], [49], [50].

PART VII: APPLICABLE LEGISLATION

49. The applicable legislation is set out in the joint list of authorities.

PART VIII: ORDERS SOUGHT

50. The appellant seeks orders that:

    (1) The orders made by the Court of Criminal Appeal on 3 April 2013 are set aside;

    (2) The convictions are quashed;

    (3) A new trial is ordered; or alternatively

    (4) The matter is remitted to the Court of Criminal Appeal to be determined in accordance with law.

PART IX: ESTIMATE OF LENGTH OF ORAL ARGUMENT

51. The second appellant's oral submissions are estimated to take no more than 1 ½ hours.

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